9-2012

Reliability and Relevance as the Touchstones for Admissibility of Evidence in Criminal Proceedings: Muhammad bin Kadar v PP [2011] 3 SLR 1205 [Case Note]

Siyuan CHEN
Singapore Management University, siyuanchen@smu.edu.sg

Case Note

RELIABILITY AND RELEVANCE AS THE TOUCHSTONES FOR ADMISSIBILITY OF EVIDENCE IN CRIMINAL PROCEEDINGS

Muhammad bin Kadar v PP
[2011] 3 SLR 1205

The Court of Appeal in *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 ("*Kadar*") formally recognised the judicial discretion to exclude evidence as an integral part of the law on criminal evidence in Singapore. This discretion, the court held, would help ensure that all evidence coming before the court would be as reliable as possible. While this commentary agrees that the foundational basis for the exclusionary discretion doctrine is desirable, it suggests that there are difficulties with the application of the doctrine. An alternative approach that works around the difficulties is canvassed for consideration.

CHEN Siyuan
LLB (Hons) (National University of Singapore), LLM (Harvard); Assistant Professor of Law, Singapore Management University.

Nicholas **POON**
LLB (summa) (Singapore Management University); Practice Trainee, Rajah & Tann LLP (at the time of writing).

I. Introduction

1 Two brothers, Muhammad and Ismil, were alleged to have robbed and murdered a woman in her own flat and in the presence of her bedridden husband. Because of the constantly changing testimonies, much of the trial and appeal centred on determining who was at the crime scene and who had committed the robbery-murder. Several statements were made to the police after the brothers were arrested, but it suffices for present purposes to focus on the first two statements made by Ismil. His first statement was made to SSI Zainal (who had 30 years of investigative experience) in a police car near the crime scene, after SSI Zainal had told the police officers accompanying Ismil to leave them alone. Despite initially denying knowledge of the offence, Ismil

confessed to having "slash[ed]" a female the day before.[1] Although there were other colleagues around who had field diaries, this statement was recorded on a piece of paper, and only recorded in SSI Zainal's field diary after lunch. Notably, a different word, "stabbed", was used.[2] Ismil gave his second statement at a police centre. He said that he had gone to the deceased's flat to borrow money and he had taken a knife from her flat; he also said he saw an old man lying on a bed in the flat, and that he had acted alone in the crime. SSI Zainal recorded this in his field diary also only after lunch. No warning was administered to Ismil before both statements were recorded, and both statements were neither read back to Ismil nor signed by him.

2 The Court of Appeal held that given the circumstances in which both statements were obtained, the basic procedural requirements found in the Criminal Procedure Code[3] ("CPC") and Police General Orders had been contravened. The court further said that both statements seemed to have been "obtained in deliberate non-compliance with the procedural requirements … rather than mere carelessness or operational necessity",[4] and went on to declare:[5]

> [T]he breaches of s 121 of the CPC and the Police General Orders are serious enough to compromise *in a material way the reliability of the* [two statements] … *it is not apparent to us that the probative value of the two statements can be said to exceed the prejudicial effect of the statements against their maker*. It could, perhaps, be said that this is more so in respect to the police car statement … SSI Zainal admitted that he was aware that a slash is different from a stab …
>
> [W]e find that *both statements should have been found inadmissible under the exclusionary discretion*. The burden was on the Prosecution to convince the court that the *probative value* of each of the two statements, which had been compromised by the manifest irregularities that took place when each of them was supposedly recorded, *was higher than their prejudicial effect*. As breaches of the CPC and the Police General Orders also appeared to be deliberate, the explanation given needed to be especially cogent …
>
> [emphasis added]

3 This declaration was prefaced by the following passages:[6]

> [T]here is no reason why a discretion to exclude voluntary statements from accused persons should not exist where the prejudicial effect of

1 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [15].
2 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [15]–[16].
3 (Cap 68, 1985 Rev Ed) s 121.
4 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [140].
5 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [146]–[147].
6 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [55]–[60].

> the evidence exceeds its probative value … the very reliability of the statement sought to be admitted is questionable ... this is an area of judicial discretion that Parliament has left to the courts … Probative value is … the crucial factor *vis-à-vis* admissibility or non-admissibility of statements from accused persons under the CPC. This is already the settled position under the [Evidence Act] …
>
> [P]rocedural irregularities may be a cause for a finding that a statement's prejudicial effect outweighs its probative value … the rules … for the recording of statements are … to provide a safeguard as to reliability. The same can be said in respect to the Police General Orders …
>
> … in Singapore, the law provides police officers with great freedom and latitude to exercise their comprehensive and potent powers of interrogation in the course of investigations. This means that the evidential reliability of any written statements taken from accused persons rests greatly on the conscientiousness [of the police officers] …
>
> [W]ritten statements taken by the police are often given more weight by finders of fact as compared to most other kinds of evidence. This is because formal statements taken by the police have the *aura of reliability* …
>
> … All that is required for a miscarriage of justice to occur is for [a] police officer to record [a] statement with embellishments … Alternatively, a police officer may be indolent …
>
> Police investigators are aware when they record statements that they are likely to be tendered as evidence before a court and there is therefore an *uncompromising need for accuracy and reliability* … a court should take a *firm* approach in considering its exercise of the exclusionary discretion in relation to statements recorded by the police in violation of the relevant requirements of the CPC and the Police General Orders …
>
> [emphasis in original]

II. Commentary

A. Overview of our analysis

4 The overarching theme of this piece thus pertains to identifying and conceptualising the touchstones for the admissibility of procedurally irregular evidence (such as the statements in *Kadar*), and more broadly, touchstones for the admissibility of *all* evidence in criminal

proceedings.[7] With regard to the former, it is a trite principle that procedurally irregular evidence is admissible, although less weight may be attached if necessary.[8] While *Kadar* reaffirmed this general rule,[9] it emphasised that the court also has the *discretion to exclude* procedurally irregular evidence that would otherwise be admissible if the prejudicial effect of the evidence outweighs the probative value. This is known as the exclusionary discretion doctrine. Although this doctrine is of some pedigree in the common law,[10] it has been plagued with numerous intractable problems and, as will be submitted, should be approached with caution. For instance, not long after *Kadar* was decided, it was pointed out that:[11]

> References to the weighing of probative value and prejudicial effect/prejudice, while perhaps conventional in local discourses of Evidence Law, are always problematic. What exactly do these two terms mean? Certainly, there have been attempts at illustrations and definitions, but even assuming these attempts are accepted, at least three further questions arise: do they have a consistent application in all the different exclusionary rules found in the [various statutes]; how exactly does one balance the two; and how do they relate to the contiguous concepts of relevance (legal and logical), weight, admissibility, and the like?

5 This commentary attempts to address the foundational issues behind the exclusionary discretion doctrines and makes the following conclusions:

(a) First, the doctrine's test of balancing probative value and prejudicial effect (the "balancing test") remains unclear as to *definition and operation*.[12]

(b) Second, cases have thus far avoided thorough discussions on the *fundamental basis/rationale* of the doctrine,[13] resulting

---

7 It has been argued, for the Evidence Act (Cap 97, 1997 Rev Ed) at least, that our law on evidence lacks a "coherent value system": Chin Tet Yeung, "Remaking the Evidence Code" (2009) 21 SAcLJ 52 at 52.

8 See, for example, *Vasavan Sathiadew v PP* [1992] SGCA 26.

9 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [44].

10 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205 at [53].

11 Chen Siyuan, "Dealing with Unreliable Evidence" *SLW Commentary*, Issue 1, August 2011 at 4.

12 See paras 7–11 below.

13 Mark Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land" (1990) 106 LQR 327; Katherine Grevling, "Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act" (1997) 113 LQR 667. However, see Richard May, "Fair Play at Trial: An Interim Assessment of Section 78 of the Police and Criminal Evidence Act 1984" [1988] Crim LR 722 at 726.

in the lack of a coherent theory to sustain its continued invocation.[14]

(c) Third, the *exclusionary discretion doctrine* should be avoided in our jurisprudence from henceforth. The very existence of this doctrine had, in fact, been coloured with some doubt,[15] following the seminal case of *Law Society of Singapore v Tan Guat Neo Phyllis*[16] ("*Phyllis*").

(d) Fourth, notwithstanding the difficulties with the exclusionary discretion doctrine, *Kadar* establishes, albeit implicitly, imperative foundations toward recognising a sounder and more concrete approach of *reliability and relevance* as the touchstones for admissibility of *all* evidence in criminal proceedings.[17] Such an approach is consistent with the provisions, principles, and purposes of the Evidence Act[18] and Criminal Procedure Code 2010[19] ("CPC 2010"), to which all evidence in criminal proceedings *must* pass muster.

6 Before proceeding, it is noted that although *Kadar* did not express a view on the application of the doctrine beyond statements to the police, the doctrine is unlikely to be (nor intended to be) so narrow in scope. This is because *Kadar* affirmed *R v Sang*[20] ("*Sang*"), in which the House of Lords had explicitly acknowledged the existence of a *general discretion* to exclude evidence if its prejudicial effect outweighs its probative value.[21] Although each Law Lord in *Sang* described the exclusionary discretion in their own terms, all of them regarded this discretion as being *general* and not confined to any particular exclusionary rule of evidence.[22] This aspect of *Sang* was subsequently adopted in *inter alia*, *Phyllis*.[23] In so far as *Kadar* cited *Sang* and *Phyllis* in support of the exclusionary discretion doctrine, it can be safely inferred that the court can exercise its exclusionary discretion *vis-à-vis* the admissibility of all evidence in criminal proceedings.[24]

---

14 See paras 12–16 below.
15 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 10.01.
16 [2008] 2 SLR(R) 239. See also *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [106].
17 See Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paras 10.01–10.02.
18 Cap 97, 1997 Rev Ed.
19 Act 15 of 2010.
20 [1980] 1 AC 402.
21 *R v Sang* [1980] 1 AC 402 at 437–438, 447. See also Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 10.22.
22 *R v Sang* [1980] 1 AC 402 at 452.
23 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [127].
24 See also *PP v Mas Swan bin Adnan* [2011] SGHC 107 at [104].

B. Problems with the balancing test

7 Although the balancing test as currently formulated has been around for decades, few attempts have been made to properly delineate the scope and operation of this test.[25] Looking at the extracts of the decision above,[26] *Kadar* is, with respect, guilty of this as well. One may argue that probative value is quite easily understood or less contentious,[27] but the same cannot be said for prejudicial effect. There is more than some trifling doubt as to what prejudice really means. Zuckerman argues that prejudice must mean something *other* than an inference which is unfavourable to the accused; anything less would mean any evidence of guilt will "never be admissible".[28] Zuckerman could not have meant that any evidence indicating guilt would never be admissible.[29] What Zuckerman might have meant was that any evidence that has some probative value would *also* necessarily be prejudicial. Thus, for the evidence to have more prejudicial effect than probative value, something *more* than evidence of guilt is required. A possible comprehension of the balancing test is to conceive it as protecting against a "logically unwarranted inference of guilt".[30] In other words, the test is a balance between the probative weight of a piece of evidence and the risk that the judge or jury would arrive at an unwarranted inference of guilt. *Ergo*, a highly prejudicial piece of evidence is one that has a high propensity to influence the mind of a fact-finder into making an inference of guilt which he would *not* have made if he had not factored in the tainted evidence.

8 One wonders, however, if prejudice and probative value are actually two sides of the same coin in so far as both concepts provide the same outcome independently. The probative value of a piece of evidence is, theoretically, objectively ascertainable and independent of the idiosyncrasies of the fact-finders.[31] This must be so if the truth of a fact is absolute. Every fact-finder's evaluation of the probative value of a

---

25 See generally Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore" [2011] Sing JLS 553.

26 See paras 1–3 above.

27 However, see Robert Margolis, "The Concept of Relevance: In the Evidence Act and the Modern View" (1990) 11 Sing LR 24 at 32 ("The Concept of Relevance"). See also Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at 7.

28 Adrian Zuckerman, "Similar Fact Evidence – The Unobservable Rule" (1987) 104 LQR 187 at 194. See also Ho Hock Lai, "An Introduction to Similar Fact Evidence"(1998) 19 Sing LR 166 at 167.

29 See, for example, *PP v Mas Swan bin Adnan* [2011] SGHC 107.

30 Adrian Zuckerman, "Similar Fact Evidence – The Unobservable Rule" (1987) 104 LQR 187 at 194.

31 P B Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After *Boardman*" (1985) 48 MLR 29 at 36.

particular piece of evidence should thus be roughly identical. If probative value is then taken to mean the likelihood of inferring guilt, whilst prejudice refers to the degree of risk that an unwarranted inference of guilt may result from the admission of the evidence, the probative strength of the evidence should correlate positively to the degree of prejudice. A piece of evidence that is unlikely to give rise to a strong inference of guilt will have an equally limited prejudicial effect even if admitted; that must be so if one assumes fact-finders to be logical. Conversely, evidence with high probative value increases the risk of an unwarranted inference of guilt if the evidence is admitted.[32] One might question why the inference of guilt is unwarranted if the probative value is high. The use of "unwarranted" in this context is a description of the likely consequential finding of guilt which would *not* have been made *but for* the admission of the evidence. Obviously, if the evidence is probative and admissible *in the first place*, then there is arguably no "unwarranted" inference of guilt; the accused *is* guilty as charged. The controversy only arises when the evidence is probative but there are doubts about its *prima facie* admissibility. Given this positive correlation between probative and prejudicial, there is, in theory, no need to balance prejudice and probative value.

9 The *reality*, however, is that the same piece of evidence can be perceived as having both low and high probative value by different people at the same time.[33] This inability to accord an objective and immutable probative value to a piece of evidence causes varying and unwarranted levels of prejudice.[34] As such, when evidence that should logically be given low probative value is mistakenly perceived as having high probative value, prejudice in the form of the risk of an unwarranted inference of guilt becomes more significant than it should be if the proper probative value was given. To illustrate, evidence of an accused's criminal past is generally excluded[35] because it may "invoke the [inescapably] deep tendency of human nature to punish".[36] Yet, this

32 See *McGovern v HM Advocate* [1950] SLT 133 at 135, where it was "obvious" to Lord Cooper that because the evidence was strong, admission of that evidence "must to a substantial extent have prejudiced the appellants in the minds of the jury".

33 See generally David Kaye & Jonathan Koehler, "The Misquantification of Probative Value" (2003) 27(6) *Law and Human Behavior* 645.

34 Thomas Gibbons & Allan Hutchinson, "The Practice and Theory of Evidence Law" (1982) 2 *International Rev of Law and Economics* 119 at 123. However, the position in Singapore is that judges are more competent than jurors to deal with prejudicial evidence and hence can assess all evidence objectively: see, for example, *Wong Kim Poh v PP* [1992] 1 SLR(R) 13 at [14] and *Tan Chee Kieng v PP* [1994] 2 SLR(R) 577 at [8].

35 *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [48].

36 Henry Wigmore, *Evidence in Trials at Common Law* (Tillers, 1983) at 1185. See also Sally Lloyd-Bostock, "The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study" (2000) Crim LR 734 at 753–755; Theodore Eisenberg & Valerie Hans, "Taking a Stand on Taking the Stand: The

(*cont'd on the next page*)

human tendency conflicts with numerous studies that have concluded that at least in respect of specific types of conduct, the belief that past behaviour is indicative of future misconduct is clearly false.[37] Prejudice results because the trier of fact "attaches more weight to the evidence than it deserved".[38] This is perhaps what was meant in *Boardman v Director of Public Prosecutions*,[39] when Lord Cross explained the substance of the similar fact rule as "not that the law regards such evidence as inherently irrelevant but because it is believed that if generally admitted, jurors would in many cases think that it was *more relevant than it was … [such that] its prejudicial effect would outweigh its probative value*" [emphasis in original].[40]

10 The aforementioned discordance between theory and reality dovetails with the last but not the least of the criticisms of the balancing test: its *operation*. What does it mean to say that the prejudicial effect must be balanced with the probative value? As has been pointed out:[41]

> [I]f a piece of evidence has the attribute of 'prejudice', does it mean it has 'a prejudicial influence on the minds [of the fact-finders] out of proportion to its true evidential value', or that it simply has no relevance (and therefore no evidential value whatsoever), serving only to unfairly colour the minds of the fact-finders to the extent of causing injustice?

It is this hitherto unresolved question that severely undermines the utility of the balancing test.[42] In theory, as explained, evidence with high probative value will naturally result in greater prejudice. Under this view, there is nothing to balance and even if one attempts to balance, the probative value and prejudicial effect will simply negate each other. Likewise, under the approach that accounts for the reality of human behaviour, the balancing test is still incoherent. The reason is that prejudice only occurs when human behaviour results in undeserved

---

Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes" (2009) 94 Cornell LR 1353 at 1357, 1380–1385.

37 See, for example, Deborah Davis & William Follette, "Rethinking the Probative Value of Evidence: Base Rates, Intuitive Profiling, and the 'Postdiction' of Behavior" (2002) 26 *Law and Human Behavior* 143; Thomas Lyon & Jonathan Koehler, "The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases" (1996) 82 Cornell LR 43.

38 Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2007) at p 423.

39 [1974] 3 WLR 673.

40 *Boardman v Director of Public Prosecutions* [1974] 3 WLR 673 at 702.

41 Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore" [2011] Sing JLS 553 at 560.

42 Colin Tapper, "The Law of Evidence and the Rule of Law" (2009) 68(1) CLJ 67 at 72–73.

weight being attached to a piece of evidence.[43] Yet, *at the same time*, one can only determine if weight is attributed undeservedly, *ie*, the prejudicial effect, after the probative value has been factored in. It cannot be said that there is undeserved emphasis placed on the evidence without reference to its probative value.[44] Simply put, the balancing test is *subsumed* within the concept of prejudice and it is illogical to then balance this prejudice against the probative value of the evidence a second time.[45]

11 Ultimately, the weighing of the prejudicial effect of a piece of evidence against its probative value is very much an exercise in abstraction.[46] Such high generality may have been deliberate so as not to unnecessarily fetter judicial discretion,[47] but the practical result is the inability to provide clear guidance to those subject to, or seeking to apply, the discretion in the first place.[48] There may well be no solution to the difficulties inherent[49] in the operation of the balancing test, but perhaps then it may be worth evaluating alternatives to the balancing test.

C. Possible bases of the exclusionary discretion doctrine

12 If the balancing test is to be replaced, regard must still be had to the fundamental basis for the exclusionary discretion doctrine. In this respect, it is noteworthy that there is still no single coherent theory that explains the fundamental basis for the exclusionary discretion doctrine.[50] There are essentially three theories that have been posited, of which the first two will now be considered.

13 The theory perhaps most widely accepted is fairness of trial.[51] It is necessary to revisit *Sang* to understand what this means since the exclusionary discretion doctrine recognised in *Kadar* is a direct descendant of *Sang*. Unfortunately, most of the Law Lords in *Sang* did not define "unfairness at trial", and those who did gave rather circular propositions. Lord Diplock conceived a fair trial as necessarily excluding information likely to influence the mind of the fact-finder that is

43 See generally Robert Margolis, "Evidence of Similar Facts, the Evidence Act, and the Judge of Law as Trier of Fact" (1988) 9 Sing LR 103 at 105.
44 Colin Tapper, *Cross & Tapper on Evidence* (Oxford University Press, 12th Ed, 2007) at p 423.
45 This was alluded to in *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [50].
46 See Antony Duff *et al*, *The Trial on Trial* vol 3 (Hart, 2007) at p 256.
47 *R v Samuel* [1988] 2 WLR 920 at 934.
48 Colin Tapper, "The Law of Evidence and the Rule of Law" (2009) 68(1) CLJ 67 at 71.
49 *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [51].
50 See generally Mary Hunter, "Judicial Discretion: Section 78 in Practice" [1994] Crim LR 558.
51 See, *eg*, *R v Sang* [1980] 1 AC 402 at 455.

"prejudicial to the accused [and] which is out of proportion to the true probative value of that evidence".[52] This is, with respect, unhelpful, as has been demonstrated above.[53] For Lord Scarman, there are three principles inherent in a fair trial: the privilege against self-incrimination, the inadmissibility of statements that were made involuntarily, and that "no man is to be convicted except upon the probative effect of legally admissible evidence".[54] Any evidence that endangers these principles compromises the accused's right to a fair trial, and may thus be excluded by the judge exercising his discretion.[55] In so far as fairness of trial is one suggested basis for the exclusionary discretion doctrine, Lord Scarman's third principle is potentially relevant. However, again, it is unhelpful to state that a fair trial is only obtainable if the conviction is based upon the "probative effect of legally admissible evidence". This necessarily ignores any consideration of prejudice – unless prejudice and probative are taken to be two sides of the same coin, which, as explained above, does not comport with the operation of the test in reality.[56]

14 The need for a fair trial has also been discussed in other jurisprudence, and this deserves brief consideration. In *R v Potvin*,[57] the Supreme Court of Canada identified two different categories of unfairness: unfairness in the manner in which the evidence was obtained, and unfairness in the trial caused by admission of evidence fairly obtained. The majority, however, suggested that these two categories were "not as distinct" and unfairness in the manner in which evidence is obtained can have a significant effect on the fairness of the trial – the corollary then is that illegally obtained evidence may attract the exclusionary discretion doctrine.[58] Judicial discretion to exclude otherwise admissible evidence continued to be regarded by subsequent cases[59] as necessary for a fair trial, but there has not been any conclusive clarification on what the courts meant by a fair trial. Perhaps the best attempt at defining the concept of fair trial was by McLachlin J in *R v Harrer*,[60] where she stated that a fair trial is neither the most advantageous trial for the accused nor the perfect trial; it is simply one which satisfies the public interest in getting at the truth while preserving basic procedural fairness to the accused.[61] However, such expressions of fairness do not assist very much as they remain couched in a high level

52 *R v Sang* [1980] 1 AC 402 at 436–437.
53 See paras 7–11 above.
54 *R v Sang* [1980] 1 AC 402 at 455.
55 *R v Sang* [1980] 1 AC 402 at 455.
56 See nn 42–49 above.
57 (1989) 68 CR (3d) 193.
58 *R v Potvin* (1989) 68 CR (3d) 193 at 237.
59 *R v White* (1999) 24 CR (5th) 201; *R v Harrer* 101 CCC (3d) 193.
60 R v Harrer 101 CCC (3d) 193.
61 *R v Harrer* 101 CCC (3d) 193 at [45]; *R v Smurthwaite* [1994] 1 All ER 898 at 902–903.

of abstraction. The penumbra meanings of what amounts to a fair trial should not be the decisive factor in hard cases.

15 So where does *Kadar* feature in this scheme of things? First, the Court of Appeal cited with approval[62] Pinsler's proposition that the court's discretion to exclude otherwise admissible evidence is based on the court's inherent jurisdiction to prevent injustice at trial.[63] Second, it cautioned that "courts should refrain from excluding evidence based only on facts indicating unfairness in the way evidence was obtained (*as opposed to unfairness in the sense of contributing to a wrong outcome at trial*)" [emphasis in original].[64] Third, *Sang* (followed in *Kadar*) suggests that the exclusionary discretion is "co-extensive" with the duty of the judge to ensure a fair trial.[65] These three facts, when read together, may lead one to believe that the basis of the exclusionary discretion doctrine is the need for a fair trial. For reasons given below, this is not how *Kadar* should be interpreted.[66] However, if *Kadar* is to be interpreted as adopting trial fairness as a basis for the test of admissibility, this basis must be limited to fairness that centres its attention on the outcome of the trial, and not fairness of the entire process of the trial (beginning with the investigations and ending with the verdict). This must be so given the prevailing position established by *Phyllis* that there is *no* judicial discretion to exclude illegally obtained evidence save arguably in exceptional circumstances.[67] Coupled with the court's multiple references to "reliability" when justifying the exclusionary discretion doctrine (this will be explored soon), the better view may be to interpret the references to "fair trial" in *Kadar* as placing emphasis on ensuring a "right" conviction. In the end, the court is expected to, and indeed, does always strive to ensure that a conviction is "right". An outcome may sometimes justify a principle, but in this case, to say that the exclusionary discretion doctrine is founded on the need to ensure that convictions are "right" is, with respect, not advancing very much.

---

62 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [52].

63 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paras 10.20, 10.24. Pinsler also makes the point (at para 10.38) that the Evidence Act (Cap 97, 1997 Rev Ed) does not actually compel the court to automatically admit relevant evidence, but it should be noted that the "Evidence Act was not drafted on Stephen's idiosyncratic view that there should be no distinction between the concepts of relevance and admissibility": Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on Opinion Evidence* (October 2011) at 7. One way to reconcile both positions is that "admissible" cannot be equated with "must be admitted". However, as will be argued, the simpler solution may be to avoid the exclusionary discretion doctrine altogether.

64 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [68].

65 *R v Sang* [1980] 1 AC 402 at 436, 454.

66 See para 17 below.

67 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124]–[127]. See also *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [64].

16 The second theory commonly invoked to justify the exclusionary discretion doctrine is: the need to ensure minimum standards of law enforcement.[68] This was, however, rejected by *Kadar*, and rightly so. Although the Court of Appeal expressed the hope that the potential exercise of the court's exclusionary discretion may lead to law enforcement officers having less incentive to breach procedural safeguards, it was quick to emphasise that courts should be "careful to avoid basing the exercise of exclusionary discretion primarily on a desire to discipline the wrongful behaviour" of law enforcement officers, including the Prosecution.[69] It may be said, of course, that the judiciary has a duty to keep law enforcement officers in check and prevent the courts from abetting or endorsing flagrant improprieties by the police, or to be perceived as indirect instruments of illegalities.[70] However, this consideration cannot be turned on its head to justify a deliberate decision to acquit an accused even in the face of evidence with high probative value pointing towards guilt. It should not be assumed that law enforcement officers will be "punished" simply because a guilty person escapes conviction as a result of procedural impropriety on the part of the law enforcement officers. One should not lightly assume that law enforcement officers inevitably derive some satisfaction at obtaining a conviction of an accused; one should also not lightly assume that upon being informed that it is their non-compliance with procedural rules which resulted in the court's decision to acquit an accused who would otherwise have been convicted, other law enforcement officers would suddenly strive to comply with procedural rules.[71] At bottom, it does not stand to reason that a guilty person should get away scot-free and society-at-large should live with the danger the guilty person may pose to them, just to fulfil a hope that an acquittal would push law enforcement officers to achieve higher standards of procedural compliance.[72] Indeed, there are many other ways, such as civil proceedings, prosecution of truly miscreant law enforcement officers,[73] and internal disciplinary

68 See, for example, Ian Dennis, *The Law of Evidence* (Oxford University Press, 2nd Ed, 2002) at pp 24–28; Peter Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon, 1997) at p 321; Andrew Ashworth, "Excluding Evidence as Protecting Rights" (1977) Crim LR 723 at 724.

69 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [68].

70 Mark Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land" (1990) 106 LQR 327 at 341.

71 Ian Dennis, *The Law of Evidence* (Oxford University Press, 2nd Ed, 2002) at p 86; William Twining, *Rethinking Evidence* (Northwestern University Press, 1994) at pp 363–364.

72 Peter Duff, "Admissibility of Improperly Obtained Physical Evidence in the Scottish Criminal Trial: The Search for Principle" (2004) 8(2) Edin LR 152 at 166; Ian Dennis, *The Law of Evidence* (Oxford University Press, 2nd Ed, 2002) at p 87.

processes that are probably more appropriate in resolving any alleged improper conduct on the part of these officers. These alternatives may be more apt especially since most, if not all, procedural lapses are individual or anomalous rather than systemic.[74] Even if it can be established that there is a systemic pattern of procedural impropriety, it is difficult to imagine the court's role and effectiveness in neutralising this. Accordingly, except where expressly stipulated by statute,[75] the court should not seek to exclude evidence simply because it thinks it is necessary to uphold minimum standards of law enforcement. *Kadar*'s confirmation that the law on criminal procedure and evidence is not the proper tool and the court not the appropriate platform to enforce disciplinary standards of police conduct is to be welcomed. However, this still leaves us without a sound foundational basis for the exclusionary discretion doctrine.

D. The unifying touchstones of reliability and relevance

17 It is now apposite to consider the third possible fundamental basis of the exclusionary discretion doctrine: reliability. A close reading of *Kadar* reveals that minimum standards of law enforcement and fairness of trial are not the predominant justifications for the doctrine.[76] *Kadar*, however, referred to reliability at least nine times in the course of justifying the exclusionary discretion doctrine.[77] Most imperatively, it said that "[o]ur statutory rules of admissibility as governed by *the CPC, the CPC 2010 and the [Evidence Act]* impose a certain minimum standard of *credibility and materiality*" [emphasis added].[78] That is, the touchstones of admissibility (of *all evidence* in criminal proceedings) are *essentially reliability and relevance* – no more, and no less. *Kadar* is probably the first case – albeit seemingly in the limited context of procedurally irregular statements – that categorically *reconciles and articulates* the unifying values underpinning the CPC (and CPC 2010),

---

73 This was suggested by the court in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [147] as a possible course of action against improper actions of police officers.

74 See generally Chen Siyuan & Eunice Chua, "Wrongful Convictions in Singapore: A General Survey of Risk Factors" (2010) 28 Sing LR 98.

75 See, for example, s 24(2) of the Canadian Charter (1982). Section 24(2) is, however, wider than the common law exclusionary discretion doctrine:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

76 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [52]–[68].

77 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [55]–[68].

78 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [117].

the Evidence Act,[79] and our case law. As relevance is already an irrefutable touchstone for admissibility,[80] it is necessary to test the robustness of *Kadar*'s proposition *only with respect to reliability*.

18 Prefatorily, reliability as the foundation for admissibility of evidence is not entirely novel. Indeed, courts[81] and commentators[82] routinely refer to reliability as a crucial consideration in admitting or excluding evidence. After some earlier misgivings, even the English courts are turning to reliability as the direct criterion of admissibility of criminal evidence in general.[83] Reliability focuses the inquiry into the safeness of using the particular evidence in arriving at its verdict. This must be a foundational prerequisite in all criminal trials; the rightfulness of a conviction is heavily dependent on the reliability of the evidence that justifies the verdict. If ensuring that the right person is convicted is a fundamental objective of the criminal justice system, it follows that reliability must be a touchstone for the admissibility of evidence in criminal proceedings. Further advantages of this proposed approach will now be highlighted.

19 First, the proposed approach is consistent with the *rules* in the CPC and CPC 2010 (that is, beyond just those governing the formal requirements of statements discussed in *Kadar*), as well as the *spirit* of those statutes. With regard to the rules, one of the representative illustrations is the established threshold of "inducement, threat or promise" that governs the voluntariness of an accused's statements (to say, the police).[84] This threshold is unquestionably premised on

---

79 Cap 97, 1997 Rev Ed. In particular, s 2(2), which circumscribes the importation of common law inconsistent with the Act, though *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 (at [117]) has already dealt comprehensively with this point.

80 It is accepted that the meaning of "relevance" in the Evidence Act (Cap 97, 1997 Rev Ed) is open to debate (see generally Robert Margolis, "The Concept of Relevance: In the Evidence Act and the Modern View" [1990] Sing L Rev 24), but this does not affect Jeffrey Pinsler's views (which is adopted by the authors of this article) in that for a piece of evidence to be deemed admissible under the Evidence Act, it simply needs to statutorily satisfy both the provisions pertaining to general categories of relevant facts (ss 6–11) and specific categories of relevant facts (ss 12–57): Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 2.26. See also *Basil Anthony Herman v Premier Security Co-operative Ltd* [2010] 3 SLR 110 at [24]–[26].

81 See, *eg*, *Fung Yuk Shing v PP* [1993] 2 SLR(R) 771 at [13]; *PP v Dahalan bin Ladewa* [1995] 2 SLR(R) 124 at [29]; *PP v Huang Rong Tai* [2003] 2 SLR(R) 43 at [27]–[35].

82 Andrew Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723; David Schwartz, "A Foundation Theory of Evidence" (2011) 100 Georgetown LJ 95 at 104.

83 Pattenden & Ashworth, "Reliability, Hearsay Evidence and the English Criminal Trial" (1986) 102 LQR 292 at 326.

84 Criminal Procedure Code 2010 (Act 15 of 2010) s 258.

reliability as the major consideration. Indeed, where an accused's free will has been sapped to the point of causing him to make a statement he would not otherwise have made, the reliability of his statement is called into question and is deemed inadmissible.[85] With regard to the spirit, although Singapore has traditionally been perceived to possess a general preference for the crime control model over the due process model, there is now a paradigm shift towards the latter in her conceptualisation of the criminal justice process.[86] Notably, a key objective of the CPC 2010 is the establishment of truth (as opposed to exclusively pursuing the objective of securing a conviction).[87] Truth and reliability are interdependent; truth can only be achieved if the premises or processes needed to establish the truth are reliable.[88] Thus, acknowledging reliability as a touchstone for admissibility is consistent with the paradigm shift. As opined, "improvements to reliability transform the crime control and due process objects of convicting the guilty and acquitting the innocent into 'two sides of the same coin'".[89]

20 Second, the proposed approach is consistent with the underlying rationales for the various so-called "*exclusionary*" *rules* in the Evidence Act.[90] For instance, in the realm of hearsay,[91] the requirement for the witness to testify to facts directly perceived is to guard against the "danger of *unreliability*", while in the realm of opinion, the rule exists to guard against a witness's "subjective reaction [that] may be *unreliable*" [emphasis added].[92] To cite an even more appropriate example, using the test of relevance and reliability for the similar fact rule would remove any confusion over the operation of the balancing test that was adopted in *Tan Meng Jee v PP*[93] ("*Tan Meng Jee*"). There, the Court of Appeal held that the balancing test was inherent within and accommodated by ss 14 and 15 of the Evidence Act.[94] Yet, it also noted that "similar fact evidence is *always prejudicial* … in reality, what is

85 *Poh Kay Keong v PP* [1995] 3 SLR(R) 887 at [42]; *Chai Chien Wei Kelvin v PP* [1998] 3 SLR(R) 619 at [48]–[50].

86 See generally Chen Siyuan & Eunice Chua, "Wrongful Convictions in Singapore: A General Survey of Risk Factors" (2010) 28 Sing LR 98.

87 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at [35], [38].

88 Catherine Elgin, "True Enough" in *Epistemology: Philosophical Issues* (Sosa & Villanueva eds) (Blackwell, 2004) at p 114.

89 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at 38.

90 Cap 97, 1997 Rev Ed.

91 Hearsay is not provided for expressly in the Evidence Act (Cap 97, 1997 Rev Ed), but it is submitted that the provisions (that relate more to exceptions to hearsay) that do touch on it are ultimately based on reliability.

92 Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paras 4.03, 8.01.

93 [1996] 2 SLR(R) 178.

94 Cap 97, 1990 Rev Ed.

'similar' enough [to be admitted] is only so because its prejudicial effect has been outweighed by the sheer probity of the similar fact evidence" [emphasis in original].[95] The problems associated with the balancing test have been outlined above.[96] What *Tan Meng Jee* probably meant was that a piece of similar fact evidence only has requisite probative value, and is therefore relevant, if it corresponds to the specific charge in question. Hence, the fact that a person has the habit of shooting at people generally albeit with intent to kill is *irrelevant* if he is being tried for the murder of a specific person, whereas the fact that he has previously tried to shoot that same specific person is *relevant*.[97] No need arises to balance any prejudice and indeed, it is illogical to balance since similar fact evidence is inherently always prejudicial. Thus, if relevance and reliability are accepted as the touchstones for admissibility, all the court needs to consider is the similarity of the evidence to the charge. Only evidence with "sheer probative value" would be relevant.[98] Reliability then becomes a relevant consideration if there is good reason to question the *veracity* of the similar fact evidence – for instance, where the evidence provided dates back a significantly long time.

21 Third, the proposed approach will remove any lingering uneasiness over potential *double standards* between illegally obtained evidence and other types of evidence such as improperly recorded accused's statements. In *Phyllis*, the court held that: (a) there is no discretion to exclude illegally obtained evidence on the basis of unfairness; (b) illegally obtained evidence that is more prejudicial than probative may nevertheless be excluded; and (c) the probative value of evidence obtained illegally by entrapment must, however, by definition, "be greater than its prejudicial value in proving the guilt of the accused".[99] In short, the court was essentially saying that all illegally obtained evidence would be of such high probative value that it would inevitably weigh more than any prejudicial effect and thus be admissible. The court has no discretion to exclude it.[100] This confusion may be eradicated by regarding illegally obtained evidence as a special class of evidence that is typically so overwhelmingly probative of guilt that if there is no procedural irregularity, the court will ordinarily arrive at a conviction. It is in this sense that there can be no prejudice in the form of attaching undeserved weight to the evidence arising from the admissibility of illegally obtained evidence that outweighs its probative value.

95 *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [49]–[50].
96 See paras 7–11 above.
97 *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [49].
98 *Tan Meng Jee v PP* [1996] 2 SLR(R) 178 at [50].
99 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [125]–[126].
100 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [124].

22 However, carving out a special class for illegally obtained evidence to reconcile *Phyllis* only accentuates the shortcomings of the balancing test. If the cumbersome test is replaced by an inquiry into reliability, the approach in *Phyllis* that all illegally obtained evidence is admissible will easily be explainable on the basis that by definition, such evidence is relevant and since the manner the evidence was obtained does not affect the reliability of the evidence which points towards guilt, such evidence satisfies the two touchstones of admissibility and must be admitted. There is no need to engage in semantical niceties or mental gymnastics to deny that there is no prejudice to the accused or to the fairness of his trial, as the House of Lords in *R v Khan (Sultan)* did.[101] There, the accused was convicted based on a conversation he had with another person that was secretly recorded by the police. It was held that the evidence so obtained did not render the trial sufficiently unfair. While it is plausible to argue that illegally obtaining evidence does not affect the fairness of the trial, it is not entirely convincing. Lord Nolan himself conceded that he "reached this conclusion not only quite firmly as a matter of law, but also with *relief*".[102] It would have been more palatable if the court upheld the conviction on the basis that the *recording itself*, notwithstanding any illegality in the process of obtaining that admission, was relevant towards proving guilt and reliable in so far as the fact that it was secretly made did not impair the veracity of the admission.

23 The upshot of the proposed approach then is that it will be quite meaningless (and indeed, inaccurate) to speak of a judicial discretion to exclude evidence (whether using the balancing test or otherwise). Under the proposed approach, a piece of evidence in criminal proceedings is either admissible or inadmissible, based on the dual touchstones of relevance and reliability. It is unnecessary and unhelpful (and arguably inconsistent with the Evidence Act[103]) to introduce an extra dimension of discretion or excludability.[104] This may seem like a radical development at first blush but is in fact not so. Although the court in *Kadar*[105] invoked the exclusionary discretion doctrine *vis-à-vis* Ismil's statements, this discretion is arguably not an exercise of "discretion" as conventionally understood. It is more apt to describe the exclusionary discretion as the power to exclude evidence which is relevant but yet at the same time has more prejudicial effect

101 [1997] 1 AC 558. The House of Lords, of course, had other human rights considerations in its calculus.

102 *R v Khan (Sultan)* [1997] 1 AC 558 at 582.

103 Cap 97, 1997 Rev Ed.

104 However, see Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 10.39; Tan Yock Lin, "Sing a Song of *Sang*, a Pocketful of Woes" [1992] Sing JLS 365.

105 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205.

than probative value. The nature of this power is such that whenever the balancing test points to net prejudicial effect, the court will *invariably* exclude the otherwise admissible evidence. Thus, it is argued that such a power or rule is not a true discretionary power in so far as the exercise of the "discretion" to exclude is predetermined by the outcome of the balancing test; there is no judicial choice, so to speak. Returning to the proposed approach, should a court be unsure as to the precise reliability of a piece of evidence, it can always admit the evidence first and subsequently attach less *weight* to it if necessary. Attributing various levels of weight to a piece of evidence is yet another mechanism to fine-tune doubts over the reliability and veracity of the evidence. It is certainly a wieldier, and truly discretionary tool for the judge than the balancing test. Indeed, there is much to commend about the judicial and judicious attribution of weight to evidence:[106]

> [T]he balancing test must be considered a close relative of another generalised approach that has emerged from judicial practice – that of admitting all evidence at the outset, and according different weight or no weight at all to the different pieces of evidence thereafter. This approach makes sense … because the court may want to take into account as many facts as possible to be apprised of the full picture … in Singapore's system where there is only judge and no jury, there is not much point in worrying that evidence is prejudicial because it may 'taint' the judge's judgment in some way – the judge will already have considered the evidence … that Singapore has no jury system has also led the former Attorney-General, now current Chief Justice, to comment at one point that the balancing test 'should have little or no relevance in bench trials as the judge can simply give whatever weight is appropriate to the evidence.'

24 Fourth, the proposed approach would in effect remove the need for a distinct test that applies to (all) the (so-called) exclusionary rules, because reliability is capable of being a basis for the exclusionary rules as well as a *test* in and of itself.[107] The question that the fact-finder seeks to answer in every case is simply "is the evidence relevant, and if so, is it reliable?" Inevitably, whether a piece of evidence is reliable depends on the facts of the case. Taking procedurally irregular statements as an example, it is impossible to fashion blanket and iron-clad rules about what kind of police conduct is so flagrant that would immediately render evidence obtained unreliable.[108] In each case, it is not a question of the quantity or quality of irregularities, but whether the irregularities

106 Chen Siyuan, "Revisiting the Similar Fact Rule in Singapore" [2011] Sing JLS 553 at 561–562.

107 In fact, our proposed approach also obviates the need for the court to invoke its inherent powers – one of the justifications for the exclusionary discretion doctrine: Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at paras 10.24–10.42.

108 Herbert Packer, "Two Models of the Criminal Process" (1964) 113(1) UPLR 1 at 32.

"materially affect" the reliability of the statement.[109] This is largely an application of logic and good common sense. As the precedents show, there is no demonstrable difficulty in determining whether the reliability of statements has been materially affected. In *Vasavan Sathiadew v PP*[110] and *PP v Mazlan bin Maidun*,[111] for example, the failure to obtain a signature in, and the failure to inform the maker of a statement of his right against self-incrimination when making a cautioned statement respectively evidently did not undermine the reliability of the content of the statements made.[112] On the flipside, where the police officer recorded the accused's statement on a note and did not read the statement back to the accused or obtain his signature, and later rewrote an expanded version of the statement and destroyed the original note, the reliability of the expanded statement was clearly suspect and the judge was right to exclude the statement.[113] Similarly, the aggregation of the lapses *vis-à-vis* Ismil's statements in *Kadar* undoubtedly cast serious doubts as to the reliability of the statements. Indubitably, there will be highly controversial scenarios which do not yield easy answers. That is where attribution of weight becomes helpful. However, that only occurs *after* the evidence is deemed admissible, and admitted. When in doubt as to the reliability of the evidence, the court can always admit it first and attribute lesser weight to the evidence. Such a practice is not radical. At any rate, in comparison to the convoluted and conceptually unsound balancing test, the intuitiveness of reliability as both the test and basis for exclusionary rules (not exclusionary discretion) is far simpler and more attractive. Determining whether a particular piece of evidence is reliable need not entail a rigorous arithmetic assessment of the probability of its truth value. The objective is simply to determine if the evidence is sufficiently reliable (and, of course, relevant).

III. Conclusion

25 To recapitulate, in *Kadar*,[114] a piece of evidence is admissible if it is material/relevant. However, the court retains a residuary discretion to exclude this evidence if it is deemed that its prejudicial effect outweighs its probative value. The proposed approach, on the other hand, is that a piece of evidence is admissible only if it passes the twin touchstones of relevance and reliability. Where in doubt, less weight can be attached to the evidence in question, after all the admitted evidence have been

109 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [65].
110 [1992] SGCA 26.
111 [1992] 3 SLR(R) 968.
112 *Muhammad Kadar v PP* [2011] 3 SLR 1205 at [66].
113 *PP v Dahalan bin Ladewa* [1995] 2 SLR(R) 124 at [86].
114 *Muhammad bin Kadar v PP* [2011] 3 SLR 1205.

considered by the fact-finder as a whole. Judicial discretion to exclude evidence does *not* feature. The advantages of adopting the proposed approach, the difficulties with keeping the balancing test, and the unnecessary invocation of the exclusionary discretion doctrine in *Kadar* have been set out. Indeed, it is believed that the judicial adoption of the proposed approach will achieve some mileage in dispelling the perennial confusion that has plagued Evidence Law in Singapore,[115] as well as achieve parity between the CPC 2010,[116] the Evidence Act[117] and case law.[118]

---

115 See generally Chin Tet Yeung, "Remaking the Evidence Code" (2009) 21 SAcLJ 52.

116 Criminal Procedure Code 2010 (Act 15 of 2010).

117 Cap 97, 1997 Rev Ed.

118 See also Chen Siyuan, "The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction" (forthcoming, 2012).